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10/081,575	02/22/2002	Robert Stanley Farr	F6146(C)	1985

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EXAMINER

MADSEN, ROBERT A

ART UNIT	PAPER NUMBER
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1761

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/081,575
Filing Date: February 22, 2002
Appellant(s): FARR ET AL.

Edward A. Squillante , Jr.
For Appellant

EXAMINER'S ANSWER

MAILED

SEP 21 2005

GROUP 1700

This is in response to the appeal brief filed July 25, 2005 appealing from the Office
action mailed February 23, 2005.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

3,063,841	ASH	11-1962
5,738,254	DE LA GUARDIA	4-1998
3,917,867	ATKINS et al.	11-1975

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1,2,5,7,10,11,12,14 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Ash (US 3063841).

Regarding claims 1,2,7,10,11,12, see Column 1, line 60 to Column 2, line 2; Column 2, lines 22-70, Column 3, lines 17-21. The container does not comprise an expandable bag.

Regarding claim 14, applicant's disclosure does not define "smooth and silky" per se, but the disclosure states "not smooth and silky (e.g. when carbon dioxide is the sole gas employed)". Since Ash teaches the gas comprises both nitrogen and carbon dioxide, the composition is smooth and silky.

Claims 1-4,11,13,14 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by de la Guardia (US 5738254).

Regarding claims 1-4,11,13, De la Guardia teaches an air (comprises at least 78% nitrogen , 20% oxygen and less than 2.0% argon) pressurized effervescent

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beverage containing 2-liter bottle, which are known to be suitable for dispensing into a person's mouth. It is notoriously well known that the conventional carbonated beverage 2-liter bottles are substantially filled, and the intended use of the invention is to provide the valve dispensing and bottle pressurizing means on top of the bottle so that a pressurized effervescent beverage is dispensed throughout the storage life of the bottle after opening. Thus, the volume occupied for the pressurized effervescent beverage would include 30% up to the fill level of the conventional carbonated beverage bottle. The container does not comprise an expandable bag (Column 1, lines 7-37, Column 1, line 67 to Column 2, line 43).

Regarding claim 14, applicant's disclosure does not define "smooth and silky" per se, but the disclosure states "not smooth and silky (e.g. when carbon dioxide is the sole gas employed)". Since de la Guardia teaches the beverage is a carbonated beverage that is also pressurized by air for dispensing (i.e. carbon dioxide is not the sole gas), the composition is smooth and silky.

Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over de la Guardia (US 5738254) as applied to claims 1-4,11,13,14 above.

De la Guardia is silent in teaching the beverage has less than about 0.5 ppm chlorine. However, it is notoriously well known in the art to remove chlorine from the water used to make a carbonated beverage since chlorine is considered a contaminant and may affect/alter the intended flavor of the beverage. Therefore, it would have been obvious to remove the chlorine to less than 0.5 ppm prior to filling the container of de la

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Guardia since this is a conventional method for improving the flavor of a carbonated beverage.

Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over de la Guardia (US 5738254) as applied to claims 1-4,11,13,14 above, further in view of Atkins et al. (US 3917867).

De la Guardia teaches a carbonated beverage, but is silent in teaching a pulp free citrus beverage. Atkins teaches forming an solids free orange juice-based beverage that advantageously be made into a bottled carbonated orange juice that has an exceptionally good quality, good storage ability, and a pleasant flavor , whereas pulp-containing orange juice was previously incompatible with carbonated beverage bottling (Column 1, lines 8-12, 33-44 and Column 5, line 34 to column 6, line 2). Therefore, it would have been obvious to modify De la Guardia and select a carbonated pulp-free orange juice since Atkins et al. teach a pulp free orange juice provides an exceptionally good quality , good storage ability, and a pleasantly flavored bottled carbonated orange juice.

(10) Response to Argument

Rejections under 35 U.S.C 102(b)

With respect to Ash, Appellant assert that Ash is directed a method for dispensing liquids under pressure into a drinking vessel to ensure a fine, regular and enduring head on the beverage going into the vessel, and there is no teaching

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whatsoever that suggest that the method dispensing is geared towards dispensing an effervescent beverage directly into the mouth of a consumer as claimed in the present invention. Appellant likes the dispensing apparatus of Ash to a faucet in a conventional household sink, which apparently is not suitable for dispensing into the mouth of a consumer.

The pending claims are product claims, but Appellant's arguments are directed to methods of dispensing and the intended use associated with a valve. The actual product limitation recited in claim 1 relating to "dispensing an effervescent beverage directly into the mouth of a consumer" is "*suitable to dispense the beverage as an effervescent beverage to a mouth of a consumer*", which, contrary to Appellant's assertion, is an *intended* use limitation. Appellant is reminded that a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is *capable of* performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963).

In the instant case, Ash teaches the recited effervescent beverage product limitations of claims 1,2,5,7,10,11,12,14 in Column 1, line 60 to Column 2, line 2; Column 2, lines 22-70, Column 3, lines 17-21. In particular, Ash teaches the valve is a valve/bush/tap configuration for a beer cask in Column 2, lines 56-70. Ash's valve

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sealed to the container is "*suitable to* dispense the beverage as an effervescent beverage to a mouth of a consumer" because it was notoriously well known that beer taps have been used to dispense beer directly into the mouth of a consumer.

Furthermore, even faucets in a household sink, contrary to Appellants belief "*suitable to* dispense...to a mouth of a consumer" because faucets have been used to dispense water into the mouth of a consumer. Therefore, Ash meets "*suitable to* dispense the beverage as an effervescent beverage to a mouth of a consumer" limitation and anticipates the claim.

Appellant contends that de la Guardia does not teach the pressurized container is suitable to be dispensed as an effervescent beverage into the mouth of a consumer. Appellant likens the container of de la Guardia to a fire extinguisher. As discussed above with respect to Ash, "*suitable to* dispense the beverage as an effervescent beverage to a mouth of a consumer" recited in claim 1 is an intended use limitation. Appellant is reminded that a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is *capable of* performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963).

In the instant case, De la Guardia meets the structural limitations for the reasons discussed above in the rejection made under 35 USC 102 (b). The valve would be

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capable of dispensing into a consumer's mouth, because de la Guardia teach the containers are 2 or 3 liter carbonated beverage containers and the valve for dispensing, as shown in Figure 4, has a similarly sized outlet as the bottle outlet. Carbonated beverage containers that are 2 or 3 liters in size were known have outlets suitable to dispense a beverage into the mouth of a consumer. Thus, if the valve were the same size as the outlet, one would expect the valve would be suitable to dispense into the mouth of the consumer. There is nothing in de la Guardia to that would teach away from the valve being used to dispense into a consumer's mouth.

Regarding the expression "smooth and silky", both "smooth" and "silky" are relative terms. The Appellant's specification includes the statement "not smooth and silky (e.g. when carbon dioxide is the sole gas employed)" on Page 8, lines 18-20 and that smooth and silky is "the feeling or sensation generated by a beverage comprising bubbles suspended therein wherein at least 80% of the bubbles are suspended therein have a diameter that is less than 0.5 mm " on Page 5, lines 1-3. It is noted that Ash does not teach the only gas is carbon dioxide, and in Column 1, lines 65 and 66 as cited in the rejection, Ash teaches gas bubbles of .01 in, or 0.25 mm. With respect to de la Guardia, the rejection was based on the fact that de la Guardia teaches a carbonated beverage in a container, wherein the head space is pressurized by air. As a result, air, which is sparingly soluble, is dispersed within the beverage. Air comprises 78% nitrogen, 20% oxygen and less than 2% argon. Consequently, de la Guardia comprises nitrogen, oxygen, and carbon dioxide, and carbon dioxide is not the sole gas employed.

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Thus, in light of the specification, it appears that the composition of de la Guardia is smooth and silky.

Rejections under 35 U.S.C 103(a)

Appellant arguments with respect to claims 6, 8, and 9 are directed to the de la Guardia as applied to the rejection of claim 1. The rejections are proper for reasons stated under Grounds of Rejection and in the response to Appellant's arguments relative to the rejection of claim 1 and de la Guardia discussed above.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Robert Madsen 

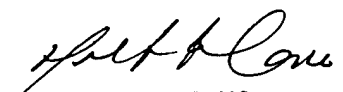
September 16, 2005

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